

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1921.

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**No. 148.**

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CHARLES S. FAIRCHILD, APPELLANT,

vs.

CHARLES E. HUGHES, SECRETARY OF STATE OF THE  
UNITED STATES, ET AL.

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**SUPPLEMENTAL BRIEF FOR APPELLANT.**

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WALDO G. MORSE,  
*Counsel for Appellant.*



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IN THE  
**Supreme Court of the United States.**

CHARLES S. FAIRCHILD,  
Appellant,

*against*

CHARLES E. HUGHES, as Secretary  
of State of the United States,

*and*

HARRY M. DAUGHERTY, as Attor-  
ney-General of the United  
States,

Appellees.

October Term,  
1921.  
No. 148.

**SUPPLEMENTAL BRIEF.**

The indulgence of the Court is prayed that a brief, supplemental to that already filed by Appellant, may be submitted as regards the subject matter presented in the Eleventh point thereof.

The point in question is found at page 46 of the brief, and is as follows:

“ELEVENTH.

“REPUBLICAN FORM OF GOVERNMENT.

“The amendment is also in conflict with the  
“fundamental guarantee of Section 4, Article  
“IV.

“The United States shall guarantee to  
each State in this Union a Republican form  
of Government.”

So far as counsel are able to determine, the question here presented has never been raised in any case before this Court. The paragraph quoted from the Constitution of the United States is deemed to be an express contract of guarantee which raises an express obligation that the guarantor will not do or suffer anything, in derogation of the right guaranteed.

Also the guarantee operates as a contract, by way of estoppel against any act or claim which may be made by any claimant under the guarantor, in contravention of that obligation as such. In presenting this supplemental brief, attention is called to the summary of the positions assumed by the Appellant and the Appellees respectively, in the National Prohibition cases, 253 U. S. 350.

The Appellants there contended in substance that:

"2. Article V of the Constitution of the United States does not authorize an amendment which directly, or in principle tends to impair or destroy the reserved police, or governmental power of the several States and their right to local self government."

The Appellees contended, claiming on the part of the Government substantially as follows:

"1. The first four contentions (of appellants) present questions which are committed by the Constitution to the Political branch of the Government for determination and are not justiceable questions."

It will be noted, that the argument so presented fails to apply with any effect whatsoever, to the disregard by one party of an obligation assumed by it and to be performed in favor of another.

Appellees also contended on behalf of the Government as follows:

"3. Article V provides the means by which powers which had previously been reserved to the States or the people thereof may be conferred upon the Federal Government, and confides to the proposing and ratifying bodies named therein the power to determine the nature and wisdom of and the method for adopting any amendment to the Constitution, except as in said article otherwise provided."

It will be observed by the Court, that the contention of the Government in the cases above quoted, might well be adopted by the Appellant in the present case, as the basis and ground of his own contention.

There are other considerations, however, which are presented in the present argument and which may now be summarized.

*The law of bi-lateral contracts is involved in this case.*

The law of contracts is involved in and lies at the base of the argument invoking the above quoted guarantee, wholly aside and apart from all questions of constitutional law or interpretation.

Unlike constitutional law, the question now considered is not one of express contract and several intention, as to mutual relationships definitely expressed and agreed; for it involves one of the three subjects expressly reserved by the Constitution it-

self from such consideration and control under the amending power.

To be sure the entire document, whereof the reservation forms a part, may be considered, for the resolution of difficulties in construction or interpretation, should such exist, but the guaranty amounts to an express reservation, of greater effect than any implied grant;—in effect equal to any express grant and perchance of import superior to and of more dignity than any other provision in the constitution,—otherwise contained.

It is last of all in the regular enumeration of powers, duties and reservations contained in the main body of the Constitution, and immediately precedes Article V, wherein is embodied the right of amendment.

This position indicates that it was no after thought, but a part of the generally and fully had and conceded understanding among all concerned at the time of the drafting of the Constitution, in which respects it differs from the reservations contained in Article V, being of the superior dignity.

It is a reservation limiting all that has gone before and all that comes after,—which latter is only an usual power of amendment, with limitations, assigned to the final place by general consent of mankind as they are accustomed to draft instruments in writing.

It is also a condition subsequent, a continued breach whereof would justify a rescission of the entire agreement and a return to the *status quo ante*.

*The question raised is unlike any under the ordinary law of contracts.*

There was and is no law or policy invokable above or beyond the terms of the contract itself. There was and is no rule of positive law or public policy, to control, limit or vary the meaning of the agreement in question.

To guide in a determination as between such mighty forces, which shall illucidate the meaning of the solemnly adopted contract, no precedents exist, saving such as may have arisen, each from a construction of the instrument itself.

It is unlike the law of contracts furthermore, in the nature of the tribunal established for the interpretation of the agreement in question. Considered in relationship to constitutional questions,—those of a nature arising within the union or such as affect private persons as among themselves,—the Court is a true judicial tribunal and the force of its decisions has always effected their own recognition either at once or ultimately, saving as regards one subject hereafter to be considered in some detail. In its relationship to the questions presented under the contract of guarantee above quoted, this court stands as an arbitrator, selected by one of the parties to the contract pursuant to a pre-existing consent on the part of the other.

The words "arising under this Constitution," as conferring jurisdiction, cover everything constituent in the Government, and undoubtedly confer upon the Court, the power of determination and control over the Departments and agencies of the Government in their relationships to all matters and things whatsoever, including contracts, agreements, modifications and amendments

of law and of the Constitution, where they affect the United States together with any other sovereignty or persons acting in the capacity of citizens of such other sovereignty whatsoever.

An intention to include jurisdiction over such other sovereignty, however, is doubtful, when a claim *in contractu* has been made under a constitutional reservation, expressly excepting a given power from the category of those granted to the Federal Government or within its jurisdiction through any possible power to amend its own constitution.

A determination regarding such powers as may be exercised by the United States, as in the Constitution expressed or implied, may be adjudicated as against the States. This Court has so held. A determination as against a State, which shall pass upon the validity of and hold void, an express reservation excluding the United States from all jurisdiction, as in a contract between that State as a separate legal entity on the one part and the Federal Government on the other, can hardly be considered as "arising under this Constitution," when the reservation was inserted therein as a direct limitation of the Federal right to exercise the prohibited power or authority as against that of the State in any manner whatsoever.

Such considerations have a direct bearing upon the right of this Court to hear and determine the questions before it. As involving "The Judicial Power of the United States," supreme and unfettered, the conscience to which has been entrusted the ultimate rightness of all acts and every proceeding of the Federal Government and of all its agencies, this Court, the one supreme embodiment of "The Judicial Power of the United States,"

may well determine the cases before it as concerning all Federal agencies.

It is to that conscience which a citizen may appeal irrespective of all matters of technical requirement. The judicial power extends moreover "to controversies to which the United States shall be a party", the jurisdiction in such respect going far beyond that previously granted over "Cases".

If the Court shall be disposed to consider whether a change in the constituent organization of one party to a bi-lateral contract, can destroy the obligation theretofore existing in favor of the other, we will now advert to the question of jurisdiction, submitting certain considerations in that regard.

No attempt will here be made to add anything to the briefs presented in the National Prohibition cases and in this case, with respect to the subject of jurisdiction generally.

Should the point be raised, however, that the guarantee above referred to, runs expressly to the several states constituting the union and may be invoked only by those States, we would ask the Court that it consider the scope and effect of its own position as a part of the integral organization of the Government of the United States, and determine whether or not Article III, Section I of the Constitution construed in conjunction with the entire instrument, places within the power of the Court, jurisdiction to pass upon a question such as that now called to its attention and presented.

Section II, of the same article is also noted,—  
 "The Judicial Power shall extend to \* \* \* controversies to which the United States shall be a party".

The jurisdiction given in the earlier part of the section, seems much broadened by the employment of the word controversy, as the United States well may be party to a controversy, wherein no case is pending in any court, such indeed being the position of the United States under the alleged amendment here in question; provided the Court should hold that the Appellants in the present instance, have no standing to enforce their claims in this Court, as a case, for the reason that no party other than one of those guaranteed in its Republican form of Government, may invoke the guarantee as against the guarantor.

Should the opinions of the Judges in this Court and their conclusions with respect to jurisdiction, be such that the main argument under the present point now about to be presented, may not be considered, it is deemed that such principal question will be duly raised in proper time, by those who may be entitled without question to claim a hearing before this Tribunal.

*Regarding the construction of the guarantee to each of the States, of a Republican form of Government.*

Were the question now presented, to have been considered prior to the decision of the National Prohibition cases, it is deemed that no further argument would have been made, saving by way of reference to decisions under the 13th, 14th and 15th amendments of the Constitution.

As to all such prior decisions, it will be noted that Appellant does not consider himself bound

by any decision rendered in this Court, either in respect of the particular argument presented under the above point, or in regard to any other matter, the questions here involved and arguments presented being essentially different in all respect, from such as heretofore have been heard or determined.

With respect to the decision in the National Prohibition cases, it may be sufficient to refer to the briefs therein as summarized earlier in the present argument and as filed at length in the records of this Court.

In no one of the cases discussed in those briefs arises any question whatever, respecting the right of the United States, through amendment of its Constitution or otherwise, to disregard the guarantee to every State, of a Republican form of Government. That question now and for the first time is definitely presented for the consideration of this Court, and in respect thereto, it may be noted that nowhere in the record or in the opinion or in the briefs filed in the National Prohibition cases, is used the phrase "Republican Form of Government" as bearing upon the questions therein presented, argued and determined.

In the present case, on the contrary, the limitation imposed by that guaranty, is expressly and directly contended to be one which limits power of amendment and may not be overridden, overlooked or disregarded by the United States or any power or authority thereof or acting thereunder, except upon the consent and concurrence of each and every state of this Union.

Not only is every State interested in its own Republican form of Government, but also is it concerned in the Republican form of Government which shall be enjoyed, exercised and carried on

by and in every other State, for the reason that the Union as a whole, can exist only as a Union of such States.

In the present suit, it is respectfully submitted that the 19th amendment has become and can become, no part of the law of the land, being in direct contravention of the supreme law of the land, expressly placed by the Constitution, beyond the power of Amendment.

*Respecting the XVIII, XIV and XI Amendments.*

It will be contended no doubt, that the 13th, 14th and 15th amendments furnish a precedent for the amendment now sought to be sustained by the Government.

The 13th, 14th and 15th amendments in the first place, were varient from, dissimilar to, and altogether unlike, the one now before the Court.

In the first place, those amendments taken altogether or singularly, did not in any form or to any extent, whatsoever confer or undertake to confer, the right of suffrage upon any individual, community or class of persons whatsoever.

Upon this proposition, it may be sufficient to cite a few cases as follows:

United States *vs.* Reese, *et al.*, 92 U. S. 214, in which Mr. Chief Justice Waite expressly so declares.

Also the case of United States *vs.* Cruikshak, *et al.*, 92 U. S. 542, p. 555, in which it is held that in the case of Minor *vs.* Hapersett, 21 Wall. 178, the Court decided that the United States has no

voters of its own creation, in the States, and wherein Mr. Chief Justice Waite reaffirms the decision last above cited.

Further the subject matter of those amendments is entirely distinct and dissimilar from the subject matter of the present amendment.

The institution of slavery, destruction whereof as a war measure became an occasion for the amendments then in question, was a peculiar institution under the Constitution of the United States. Before determining the scope and effect of decisions sustaining those amendments, this court and those who seek an understanding, should not forbear to read the earlier decisions which disclose the conditions so arising.

In the Dred Scott case, 19 Howard 393, constitutional provisions regarding negro slaves are discussed and the institution in question commented upon at length.

The right to import slaves is discussed at page 411.

General naturalization laws will be found considered on page 417.

The definition of free inhabitants is noted on page 418.

Congressional laws as to negroes are considered upon pages 419, 420 and 421.

That States absolutely control their own franchise and may confer the same on those not citizens, is noted at page 422.

And the possibility of the amendment of the Constitution as to slaves is mentioned at page 426.

The above notations are from the opinion of Chief Justice Taney, with Justices Nelson, Geier, Daniell, Campbell, Catron concurring, while Justices McLean and Curtis dissent with opinions.

Another case discussing the institution of slavery is *Prigg vs. The Commonwealth of Pennsylvania*, 16 Pet. 539 At pages 610-611:

“By the Court:

“Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fully secure and attain the ends proposed,”

and on page 611:

“It cannot be doubted that it (the right to recover slaves) constituted a fundamental article, without the adoption of which the Union could not have been formed.”

Similar words occur in the opinion of Mr. Justice Story who also sets forth at page 623:

“Before the adoption of the constitution, no state had any power whatever over the subject (negro slavery), except within its own territorial limits, and could not bind the sovereignty or the legislation of other states.”

Again at page 642 the learned Judge Wayne writes:

“Is it not more reasonable to infer, as the states were forming a government for themselves, to the extent of the powers conceded in the Constitution, to which legislative power was given to make all laws necessary and proper to carry into execution all powers vested in it—that they meant that the right for which some of the states stipulated, and to which all acceded, should from the peculiar nature of the property in which only some

of the states were interested—be carried into execution by that Department of the general government in which they were all to be represented the Congress of the United States,”

and at page 645 :

“The framers of the Constitution did not act upon such narrow grounds. They were engaged in framing a government for all of the States; by concessions of sovereign rights from all, without impairing the actual sovereignty of any one, except within the sphere of what was conceded.”

Such then was the peculiar institution of slavery involved in Amendments 13th, 14th and 15th as may well be noted at the present time.

No less is it true of the guarantee to each of the States, of a Republican form of Government, than was it true in respect to the matters then before the Court, that the rights and powers reserved to the States, then by the general provisions of the Constitution,—now and in the present case by an express contract and agreement on the part of the United States, made with and to each of the several states;—that, in the absence of such understandings and agreements, there implied and here expressed, an absolute *impassé* would have arisen, and the Constitution would have proven a dead letter. The United States as attempted to be organized would have come to naught and utterly failed to exist.

In the Pennsylvania case the learned Justice noted that fifty years had elapsed since the raising of the first question in the Supreme Court of the United States, at the time of the decision of Prigg case cited *supra*, and proceeded to predict that the decision of the Supreme Court then; rendered

impossible any further question or controversy which might have existed in the absence of such decision.

Later in this brief is discussed somewhat of the law of contracts and the law of promotion as applicable to the status of the several States under the Constitution of the United States, but here and now we will pass on to the immediate question in hand.

Further citations, respecting the 13th, 14th and 15th amendments may be indicated as *Hodges vs. U. S.* 203 U. S. 1, and the *Slaughter House* cases, 16 Wall. 36, in which latter case, the Court by Mr. Justice Miller expressly sets forth at page 67, the importance of the questions there considered and the effect of the 13th, 14th and 15th amendments thereupon.

Without further comment or citation and for the purpose of the consideration of the provisions of the Constitution concerning African slavery, we may turn to the instrument itself.

The Constitution of the United States, Article I, Section 2, as originally adopted, provided as follows:

“Representatives and direct Taxes shall be apportioned, etc., according to their respective Numbers, etc., determined by adding to the whole Number of free Persons, including, etc., and excluding Indians not taxed, three-fifths of all other Persons.”

Here then is a recognition of African slaves who give to their respective states representation to the extent of three-fifths of their members in each State.

Upon the emancipation of the slaves, as a war measure, the question was presented as to what

should be done with that three-fifths representation, which had existed since the establishment of the Union, under the concurrence of all of the States.

Previously that three-fifths of the population had been represented by the votes of the masters of the slaves. Should such representation be altogether destroyed or should it be continued under the votes of the masters or should it be made a full representation?

The last proposal was adopted for the reasons fully set forth in case already cited.

Section 9 of the same article of the Constitution provides:

“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

Article IV, Section 2, of the Constitution, provides:

“No person held to Service or Labor, etc., escaping, etc., shall be discharged.”

Again indicating the special and peculiar position of the institution of slavery and the status of the slaves.

Once more in article V of the Constitution, appears a further reference to the peculiar institution of slavery as follows:

“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the

Ninth Section of the first Article, and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Thereafter and following the adoption of the Bill of Rights as part of the Constitution, and following the freeing of the slaves, came amendments 13th, 14th and 15th, dealing with the peculiar institution in question, following the emancipation of the slaves as an act of War, construed by this Court as conferring no franchise or right to vote upon any person whatsoever, and it is submitted that this court cannot follow the decisions holding such amendments to have been valid, without a most material extension of the scope and effect of those decisions, covering new and altogether different grounds and deciding that rights, privileges and franchises heretofore and up to the present moment, held to be wholly and exclusively within the jurisdiction and powers of the several States, now may be taken away from the States and vested in the United States.

Such considerations then, disclose the complete failure of all analogy between the earlier amendment of the Constitution and the amendment now before the Court.

Never has the status of the family as a political organization and as the basis for political power, failed in recognition, prior to times well within the memory of the present generation. Uniformly and without exception, in Colonial times, after the Revolution, upon the establishment of the Constitution and through the Civil War, will be found a complete absence of legislative or other attempt to prevent the universal and consistent representation of the Community in its defense and political administration, by the adult males of the Communities respectively.

Neither in the Constitution nor in the Laws of the United States or of any State, will there be found a hint of such peculiar reservations, restrictions and bases of jurisdiction over women, as those which we have found and examined, referring to African slavery.

There is nothing upon which the law making power or the Court can lay its hand, as affording any ground for a holding that any person, State or convention considered or contemplated, the possibility of an abandonment of a male suffrage, representing families as the constituent organizations upon which the State had been, was and should be established and perpetuated. The distinction seems ample, complete and conclusive.

The Constitution of the United States, in its implied reservations and more particularly in its express limitations of power, was established as and yet remains a barrier against innovations such as the one embraced in the 19th amendment, sought to be forced upon any State.

A quotation from Andrews American Law (Edition 1908, Vol. 1, at page 155) may be indulged:

“That any attempt by the whole people, or by any majority of them, or any portion of them, to accomplish the same in any other mode, would be legally nugatory, unconstitutional and revolutionary, and that the people have expressly guarded themselves against the will of majorities and have rendered themselves incapable of destroying the autonomy of the states, by guaranteeing to each a republican form of government”.

### **The 19th Amendment is Unlike the 15th.**

In its operation, the 15th amendment confers the electoral franchise upon no one. This Court has so held.

In its operation the 19th Amendment has conferred the electoral franchise upon millions. It was intended so to do.

The difference in operation arises from the variant character of the subject matter upon which the Amendments were to operate.

In effect, and broadly speaking, free men had always enjoyed the franchise under all State Laws.

When the chattel slaves were confiscated as contraband of War and then guaranteed freedom, both as acts of War, the freedom so granted by the United States to those who had been its own, was sought to be protected by means of the 15th Amendment.

At that time the former slaves already possessed the franchise by the force of their freedom, in which the Amendment did no more than guarantee them.

The 15th Amendment mentioned neither man nor woman, yet no single woman was by it enfranchised for the simple reason that it enfranchised no one.

No more can the 19th Amendment enfranchise anyone. In terms, it might be held to prohibit the disfranchisement of women in the State of Colorado, but such was not its intention.

The 19th Amendment on the contrary, was intended to accomplish something entirely novel in our history and to grant the franchise by its own force directly to woman who theretofore had enjoyed no such rights under any State Law.

It has caused that revolutionary change and should be declared unconstitutional by this Court.

It is not yet too late to save the faith and credit of the United States.

### The Improper Contentions of Appellees.

The position of Appellees is intensely improper.

Continuously since the time of Lord Holt, the elective franchise has been a property right, enjoying the recognition and protection of the law, throughout England, the United States and all countries wherein the common law has prevailed.

That franchise has been enjoyed by these States and their citizens undisputedly and under claim of absolute right, during the entire period of life of the Republic until now, when Appellees argue that it has been taken away by a recently devised *vis major*, in the form of a new brand of constitutional law.

During the days of Marshall, Story, Taney, Waite and their contemporaries, such contentions would have proved futile.

Among the members of the Constitutional Convention, the proposition would have aroused alarm and derision as unthinkable to some and portentously terrible to others.

When then, where and how, did the determination that the United States should acquire this franchise and right against the will of certain States arise?

It can not be that subtle and covenous minds embodied the power to appropriate, in the text of the Constitution itself, for no such hint is found in all of the histories of the debates and times from which the Constitution sprang.

The States were not tricked into an unwitting cession of inherent rights, through any subtlety of language deftly defrauding the signatories to the Constitution. The Constitution by its terms did actually protect the States in the reservations of rights, stipulated on the face of the document.

All of the early, middle and historically late determinations of this Court, justify this postulate. The Appellees then cannot be in the position of receiving rights of property covenantously acquired by others.

But were defects discovered in the Constitution, by reason whereof, it should appear that the States unwittingly had exposed themselves to a deprivation of their property and rights, yet the Appellees claiming under the United States would be estopped from availing themselves of such rights in fraud of the rights of the States which had relied upon and acted upon the representation of the promoters of the United States, to the effect that no such defect did in fact exist.

### **The Law of Promotion and Promoters.**

The States of the Union are Corporations, political corporations it is true, but still corporations, with power to sue and be sued, to hold and transfer property and to have perpetual succession, as well as to enjoy all of the other incidents of corporate organization.

The United States is a corporation likewise and no less and as such was established by the People of the United States through their convention called by the States, and ratification by the several States.

The actions, representations, pronouncements and declarations of the Constitutional Convention and its envoys, to the States in urging an adoption of the Constitution, were, one and all, the prospectus, representation and inducement offered and presented to the States to secure a ratification of the Constitution.

Relying upon such arguments, statements and representations, the States surrendered to the Federal Government certain properties and rights absolutely, and certain others in trust, while reserving to themselves expressly or by implication, certain others.

The United States at once and with full knowledge, proceeded to avail itself of the rights, property and advantages so accruing to it and for many years, through its legislature and Courts, considered and recognized such representations, of the benefits whereof it had availed itself, the agreements made by its promoters upon its behalf becoming thereby binding upon the United States and its agencies.

It is unfair and unlawful that Appellees now should avail themselves of any alleged right, claimed to exist against the States, pursuant to the Constitution when the same is in conflict with and contravention of the representations and assurances upon which the States so relied in entering into the corporate organization of the United States.

### **A Republican Form of Government.**

Any construction of the guarantee to every State, of a Republican form of Government, other than the one so agreed, represented, understood and adjudicated is not now open to Appellees, being contrary to good law, good ethics and good morals.

The Appellees are bound by all that binds the United States. Shall the United States work an injustice? "Shall not the Judge of all the earth do right?"

No evasion, quibble, sophistry or contention can obscure, blink or escape the recognized truths, facts and verities which assured the States in their rights as claimed, reserved and conceded.

The arising of a new race which regards not tradition and reads no history can not alter the force of established truth. No changes of times or ideas are capable of altering fundamental facts.

### **As to the Tenth Amendment.**

The law of promotion and promoters may be noted here as affecting the binding force of the tenth and certain other amendments to the Constitution.

Those amendments were passed pursuant to representations and agreements which were a condition precedent to the adoption of the Constitution.

The United States is estopped from their change or breach.

They have become in effect parts of the original document and unamendable as such conditions precedent and as conditions subsequent persisting as long as the agreement shall endure, invocable upon the objection of any several states concerned.

### **A Taking by Force is the Only Alternative.**

Appellees then, must contend and argue that the Federal Government may take, hold and acquire the rights and franchises in question, without color of title or authority.

By means of a constitutional change, itself of doubtful validity as such, a basis would be claimed as established, whereby governmental agents, un-

less directly restrained by the Courts, should proceed in total disregard of the contractual rights of other governmental bodies, outside the scope of the powers by them vested in the Federal Government, and that in direct contravention of property rights, expressly retained by those other governments and to their citizens, individually and through the States, and to them as such expressly guaranteed by the United States.

### **The Law of Contracts.**

Over and above all argument and question as to Constitutional Law, stands out then the questions indicated under the Law of Contracts, which leave to appellees no justification for the possession of property and rights not their own, other than the allegation that they have been taken by another, strong enough to take them, and deposited for use in the hands of appellees.

Such is a dangerous contention, more dangerous in fact and more boldly destructive in form, than were many which have divided nations and disrupted States.

That danger must be apprehended, is shown by legislative activity foreshadowing another constitutional amendment, reducing representation in the House of Representatives in the case of any State which should disregard the Nineteenth Amendment.

Evidently the Federal authorities lack power to enforce directly their title to and possession of the asported franchises of the States. They must resort to indirection, keeping and concealing the property in the Federal preserve beyond the reach and power of its owners.

Other means whereby the Federal possession and employment may be made more directly effective, may be devised later. The organs whereby the States themselves could retain, retake, hold or exercise such property right and franchises may be removed or destroyed through constitutional amendment.

Such simple practice would be in complete accord with the contentions of appellees, who set no limit to the expansion of Federal power and jurisdiction, other than the will of the Federal Government itself, and a *prima facie* compliance with a form of legislative State ratification by a requisite majority.

Such contentions in former causes, have been heeded as to powers reserved to the States.

Here and now it is urged by appellees, that express constitutional guarantees likewise may be overridden.

As to that appellant submits himself to the Court.

WALDO G. MORSE,  
Of Counsel for Appellant.

Office Supreme Court, U. S.  
FILED

JAN 28 1922

WM. R. STANSBURY  
CLERK

# Supreme Court of the United States.

OCTOBER TERM 1921

No. 148

CHARLES S. FAIRCHILD,  
Appellant,

*against*

CHARLES E. HUGHES, as Secretary  
of State of the United States,  
and

HARRY M. DAUGHERTY, as Attor-  
ney General of the United  
States.

## PRINTED ARGUMENT FOR APPELLANT.

Everett P. Wheeler, of counsel for appellant, is unable in consequence of sickness to take part in the oral argument, and asks leave to submit the following printed argument embodying what he would say in reply to the argument for the Appellees in this case and for the defendants in error in *Leser versus Garnett*. Many of the arguments for the Appellees are dealt with in the briefs already filed and need not be referred to here.

FIRST. The FIRST TEN AMENDMENTS.

Much stress is laid, particularly in Attorney General Armstrong's brief, on the proceedings in the Convention which framed the constitution. Mr. Gerry is quoted as saying that under the article providing for amendments a majority of the states "can bind the union to innovations that may subvert the state constitutions altogether." This danger was appreciated by the people. In the conventions elected by them to consider the constitution as shown in the principal brief, their sense of this danger was expressed.

They had in mind the famous Bill of Rights which had been adopted by the British Parliament in 1689, after the Revolution which placed William and Mary on the throne, and was presented to them February 15th, 1689. This embodied the fundamental principles of the British Constitution. It declares at the outset that it is framed "for the vindicating and asserting their ancient rights and liberties."

After a statement of these principles, some of which the framers of the American Constitution embodied in the Constitution itself and the rest of which are in substance expressed in the first ten amendments, the English Bill of Rights concludes:

"And they did claim, demand and insist upon all and singular the premises as their undoubted rights and liberties."

It is essential to note that this act of Parliament approved by William and Mary claims these rights as the inherent rights of Englishmen. The act of Parliament is only a formal declaration of them, to which they asked the assent of the king and

queen, not for the purpose of establishing the rights, but solely to bind them to the acknowledgment of the rights.

*Encyclopedia Britannica, Vol. 3, pp. 943-944.*

All this took place less than a century before the constitution was adopted and just a century before the inauguration of Washington. It was fresh in the minds of the men who ratified the constitution. It was the declaration upon which they had insisted in all their controversy with the British Parliament. They claimed that their rights in the Colonies were the same as those of Englishmen at home and that they were inherent rights. This proposition is expressed in the Declaration of Independence.

"We hold these truths to be self evident, that man is endowed by his Creator with certain inalienable rights, among them life, liberty, and the pursuit of happiness."

The criticism they passed upon the written constitution as proposed for adoption was that it did not contain a statement of these inalienable rights. Therefore, in several of the Conventions; notably those of Massachusetts, New Hampshire, Virginia, New York, and Rhode Island, it was insisted that the adoption of a Bill of Rights was essential. This was proposed in definite form to the other states as shown under the Sixth Point in the principal brief. This proposition was agreed to by all the States and was unanimously ratified by them all as soon as the new Government went into operation. Can there be any doubt historically that it was then unanimously agreed by all the States that the rights declared in the first ten amendments were inherent and inalienable and

that they cannot be subverted by any amendment under Article V? They were adopted subsequent to that article and necessarily control it.

The argument therefore that no such limitation was contained in the original constitution and that under this alone it would have been possible to subvert the State Governments confirms our present proposition. It was the fear of this that led to the unanimous adoption of the first ten amendments. No longer is it possible under color of Article V to subvert the State Constitutions. The question is not what the constitutional convention did but what the states did when they ratified the Constitution.

The case is analogous to that of the Four Power Treaty signed by the plenipotentiaries of the United States, British Empire, France and Japan, December 13, 1921.

*Times Current History, Jan. 22, pp. 545-546.*

After the signature of this treaty the American delegates presented a reservation note. This obviously was not binding upon the other powers until they accepted it. They did accept it and clearly it is now just as binding as the rest of the treaty.

#### SECOND. DELEGATED AND RESERVED POWERS.

It is true that so far as the final adoption of amendments is concerned it is a power reserved to the People. But how are the people to exercise this power? Either through conventions or through legislatures. In either case the power is in the people and the only power that either the conventions or the legislatures have is that which

they possess through delegation from the people. The legislature is not the People. The argument that it overlooks the fundamental principle of the American system.

Parliament had claimed to be omnipotent. The colonies revolted against this conception. They had no idea of setting up in America omnipotent legislatures. The argument that these legislatures have absolute power irrespective of the constitution which created them, would have sounded well from the lips of Lord North, but it is repudiated by all American leaders from Jefferson to the present time.

Counsel lay great stress on the decision of this Court in the referendum case. This case did undoubtedly hold that a referendum is not a part of the legislature and that therefore the People of the state, so far as amendments to the Federal constitution are concerned, cannot impose that as an additional condition.

When we refer them to *Haire versus Rice*, 204 U. S. 291, they reply that this decision dealt with a statute and not with the constitution. But what authority is there for saying that words in a statute have any different meaning from words in a constitution. They are both expressed in the English language. Words in this language must have the same meaning whether placed in a constitution or in a statute.

### THIRD. CIVIL WAR AMENDMENTS.

The action of Congress after the Civil War was no doubt illogical. I can say so with mere positiveness because I took part in the discussion and argued, as did so many others, that the Southern states had no right to secede, and therefore in the eye of the law never had seceded, and were

entitled to have full privileges as States of the Union. President Johnson took that ground but a two-thirds majority of both houses of Congress overruled his vetoes and the victorious North decided that the secession, *de facto*, had deprived the seceded states of their rights and that it was competent for the North to impose conditions for their readmission. Until they accepted these conditions they were deprived of all suffrage in the Senate as well as in the House.

Counsel refer to the Milligan case, 4 Wallace 2. That denies that any of the "provisions of the constitution can be suspended during any of the great exigencies of government." But this case is not adverse to our contention. It held that it was not lawful in a state which had not seceded, to try a man by military commission during the war. That is not opposed to the doctrine of this court in *Stewart versus Kahn*, 11 Wallace 493-507, quoted on page 43 of the principal brief. The power to declare war is granted by the constitution. It is not by a suspension of this law, but by its enforcement that the government had "inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." This power can be exercised notwithstanding the fact that some of the states might object to the methods adopted by Congress. The fact referred to by the Appellees that Kentucky and Delaware objected at the time to the 14th and 15th amendments could not limit the exercise of the war power. They had been slave States. The right to abolish slavery applied equally to them.

#### FOURTH. THE SEVENTEENTH AMENDMENT.

This amendment expressly reserves to each state the right to regulate the electorate for the Senate. It rather confirms our argument that this right was considered inherent.

FIFTH. The argument for Appellees shows the vital importance of enforcing the restrictions which the people of each state chose to put upon the powers of its legislature. Appellees insist that the power to amend is unlimited. This means of course that the liberties of the citizens of the United States may be taken away by a majority of the state legislatures under guise of an amendment to the Federal constitution. To assert that there is no power of the People in a State to protect their rights against such encroachment is to declare that we are not a free people.

#### SIXTH. ACQUIESCENCE.

It is argued that all the States have acquiesced in the nineteenth amendment. This is an erroneous statement. It appears in this record that citizens of ten states have formed a league which is represented here by their President, Mr. Fairchild, in which they claim their rights as citizens under the Constitution. These rights they can vindicate by suit as shown under the Fourteenth Point of the principal brief.

There has been a certain amount of acquiescence by the public authorities. This shows the disposition of the American people to submit respectfully to a proclamation of the Secretary of State until by competent judicial authority it is set aside. This acquiescence is like obedience to an injunction, pending an appeal from the order granting

the injunction. The Fairchild suit is an orderly method, well known to equity jurisprudence, by which individual citizens, apprehending an invasion of their rights, bring an action to prevent officials from violating these rights. Action by these officials *pendente lite* as shown under the Third Point of the principal brief, does not in any way affect the power of the Court in its final decree. But so long as the proclamation of the Secretary of State is on the statute books which are in every law library, and are evidence in every court, it is part of our American system that respect should be paid to it. It would be intolerable if its validity could be contested collaterally wherever there was occasion for action under it.

#### SEVENTH. PAST ELECTIONS.

The remaining argument that a decree now declaring the invalidity of the proclamation by the Secretary of State of the ratification of the 19th amendment would invalidate past elections, is also based on a misconception of the American system.

Whenever an election is held the votes are canvassed, the certificate of the canvassers goes to the proper authorities, and an orderly way is provided by which the result of the elections as shown by the returns is declared. Any citizens interested in contesting the election must do it by a direct proceeding, and if they claim that illegal votes were cast, must show that the result of the election was affected thereby and that if the illegal votes had not been cast the result would have been different. Probably there never was an important election in this country in which some illegal votes were not cast. But here again an orderly method is provided by which the result

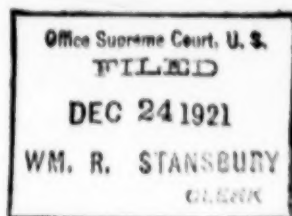
can be tested in due course of law. In the absence of such contest its validity can not be impeached.

It is therefore clear that any decree which the court may make in this case will be prospective only, and will not in any way affect elections which have been already held and the result of which has been duly certified according to law.

EVERETT P. WHEELER,  
of Counsel for Appellant.



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IN THE

# Supreme Court of the United States.

CHARLES S. FAIRCHILD,  
Appellant,

*vs.*

CHARLES E. HUGHES, as Secretary  
of State of the United States,

*and*

HARRY M. DAUGHERTY, as Attor-  
ney-General of the United  
States.

October Term,  
1921,  
No. 148.

## SUPPLEMENTAL BRIEF.

In view of the magnitude of this case and its far-reaching consequence and the necessarily extended historical study in the main brief, we respectfully ask permission to file this supplemental summary presenting in condensed form some of our main contentions concerning the lack of power in Congress to propose or legislatures to affirmatively enact such a measure as the 19th Amendment.

## FIRST.

The amending Article V was provided for changing, limiting, shifting or delegating "powers of government." It was not provided to enable the Government to deprive "the People" of the power to amend their State constitutions. The 19th Amendment is therefore *ultra vires*.

Article V was provided as a means by which to change the incidents of Federal governmental Power delegated by the "sovereign people" to their common agency, their Federal Government, to improve the form and structure of said Federal Government, or as lately decided in Rhode Island *vs.* Palmer to "delegate new powers" to that governmental agency.

It was not established to amend, abolish, destroy or limit in any way, the sovereignty of the people, i. e., to determine who shall constitute "the people."

The ultimate sovereignty of the people, as expressed in the free determination of suffrage qualifications, the right of the people to determine for themselves who shall exercise their sovereignty, who shall govern them, is not even delegated to their State Governments, but reserved under the control of the people themselves in their State Constitutions. Changing the "sovereign Power" is not an end or purpose of the Federal Government. The amending clause was not provided for "Amending the people." The people were not setting up an amending agency for their own destruction. The powers of their Federal governmental agency were not limited, and those limits committed to writing, to the end that the sovereign

people, who themselves imposed the limits, should have their sovereignty destroyed, infringed or impaired by agents selected to change these "powers of government," perfect the Federal Government, or grant to it new governmental powers. The creature is not greater than the creator.

Popular election was provided for only one office created by the Federal Constitution—members of the House of Representatives. For this office "the electors in each State shall have the qualifications for electors of the most numerous branch of the State legislatures." Art. 1, Sec. 2.

This is more than a uniform rule for the exercise of State authority. It is more than the recognition of the residuary sovereignty of the people of the States, from whom a "grant of powers" for a Federal governmental agency was being asked, as applicable to the election of each State's representative in the Federal House. It was the adoption of the same *basis* of sovereignty for the Federal Union as existed in the States. It was a recognition that the "sovereign people" who were asked to ratify in their States were the "same sovereign people" who were to constitute the ultimate sovereignty under the Constitution.

The same "sovereign people" who governed their individual States, to whom the Constitution was submitted and by whom it was ratified, who through their own State government were to appoint electors for their Federal Executive, and through their own State legislatures (now by their own direct votes) were to choose their Senators in the Federal Senate; were by Section 2 of Article 1 established and *constituted as the popular sovereignty* for the only office to be directly elected in their Federal government, then being erected by themselves, "in order to form a more

perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

## SECOND.

By extra constitutional means in both proposal and ratification the amending power was the *form used* for expressing the results of revolution after the civil war. By submission to *vis major* followed by the unanimous "consent" of all the States and the acquiescence of all the people of the United States, the entire Nation was "reconstructed," made anew, to permanently establish the freedom and equality of the negro race, for which the civil war was fought, by constituting said race part of the sovereign people of the United States.

The fact was "revolution." The form of settlement happened to be through the Amending Clause, a use thereof only sanctioned by the "Laws of War." This extra Constitutional procedure was, however, acquiesced in by all. Any other method for permanently registering the inexorable decree of civil war would have been equally effective. It simply *under that form* registered in the organic law the fact already accomplished.(1)

(1) In most if not all the seceded States, either through the "reconstruction" State Constitution or by military fiat the freedmen had been permitted to vote before the 15th Amendment was adopted. The freedmen of those States thus previously enfranchised elected the legislatures whose affirmative votes made up the necessary three-fourths for the 15th Amendment. Their situation was analogous to that of the 15 Woman-suffrage States today, except that their Constitution had been changed not voluntarily but under the coercion of military rule.

Here no "revolution" is to be settled, no subject race freed, no peace terms to be imposed on rebel states, but the form used in that revolutionary act is now invoked to *destroy the sovereignty of the people.*

### THIRD.

Article V itself (aside from revolutionary sanction) was never intended to deal, could not in the nature of the case deal with or affect the sovereignty of the people.

Here it is attempted through its use to *attack, limit and fossilize* the people's sovereignty in their State and local elections as well as in the election of Federal representatives and in the choice of legislatures and conventions to assent to or dissent from proposed Federal Amendments. When they ratified the Constitution, the people were not asked to cede their sovereign power nor to delegate, to any agents whatsoever, the right to interfere with their sovereignty. And Sec. 2 of Art. 1, recognized its continuance in them as before.

The ultimate sovereignty of the people exists in their States, outside their Federal Constitution, outside and beyond their Federal Government. An amending clause for perfecting and changing the Federal Constitution, bears no relation to the sovereignty of the people, can not deal with it, can not amend or destroy it. Their sovereignty and its ultimate expression through suffrage remains the same forever, until changed by the people themselves, by their own political action in amending their State Constitutions, where they have deposited it, unless forcibly changed by rev-

olution. Assembled in State conventions for the purpose of discarding their present form of government and adopting a new one, as they adopted the present Constitution, they could of course change it or surrender it. They could thus surrender their ultimate sovereignty to a king, to an aristocracy, to a dictatorship (of the proletariat or otherwise). But this again amounts to revolution. No mere legislatures, acting representatively in amending a mere "grant of powers" for Federal purposes (which is all the Constitution is), can take upon themselves the sovereignty of the people and determine for them, by practically irrepealable rule, who shall govern them, who shall exercise their sovereignty.

The Federal Constitution did not destroy the sovereignty of the people. It protected it, both in the perpetual proviso in Article V itself and in the whole scheme of the instrument. The Federal Constitution is not a grant of "sovereignty," but a mere grant of Federal powers to a common agency, created to protect and preserve the rights of the people and to safeguard in perpetuity their sovereign power.

As Madison said in the Federalist Art. 46:

"The Federal and State Governments are in fact but different agents and trustees of the people instituted with different powers and designated for different purposes."

(Cited by Chief Justice Fuller in *Pollock vs. Farmer L. & T. Co.*, 158 U. S. 560):

"The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies but as un-

controlled by any common *superior* \* \* \* The ultimate authority, wherever the derivative may be found, resides in the *people* alone \* \* \*. Truth no less than decency requires that the events in every case, should be supposed to depend on the sentiments and sanction of their *common* constituents."

The power of the Amending Agents is necessarily limited to the Federal grant which did not include the right to grant or withhold suffrage, the determination of who shall exercise the sovereignty of the people. This same sovereignty of the people who ratified the Constitution "the original fountain of power" acting in their States, has been recognized by this Court ever since the decision in *McCulloch vs. Maryland* (4 Wheaton 403) as the source of the grant itself and of all new governmental powers added thereto by amendment. Having taken no sovereignty away from the "people" who ratified, having constituted no new sovereignty in the Constitution itself, it conclusively follows, that no provision for amending or changing this mere grant of governmental powers can subtract from the sovereignty of those who made the grant, the sovereign people of the United States.

Alexander Hamilton (in 52nd Federalist) spoke of the definition of suffrage as being "a fundamental article of republican government" properly beyond legislative control, which it was incumbent on the convention to establish in the Constitution. And that *as so established* in Article I it was rightly *not* subject to regulation by either Congress or the State Legislatures adding:

"It must be satisfactory to every State because it is conformable to the standard estab-

lished or *which may be established* by the State itself."

This of course was untrue if Congress and outside legislatures could dictate a State's suffrage. He continues:

"It will be safe to the United States because being fixed by the *State Constitutions*, it is not alterable by the *State governments*."

Later, in 59th Federalist, while defending Congressional control of the "times, places and manner" of elections for the Federal House, he said:

"Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections *for the particular states*." \* \* \* This would be \* \* \* "an unwarranted transposition of power and a premeditated engine for the *destruction of the state governments*." \* \* \*

"Each" (the Federal and State Governments) as far as possible ought to *depend on itself for its own preservation*."

Then urging that because the States could refuse to elect Senators, was no reason for giving them similar power over the House, he said:

"So far as the mode of formation (he was speaking of the Senate) may expose the Union to the possibility of injury from the State legislatures it is an evil; but it is an evil, which could not have been avoided without *excluding the States, in their political capacities*, wholly, from a place in the organization of the National government. If this had been done it would certainly have deprived the State governments of that *absolute safeguard* which they will enjoy under this provision."

He was speaking of the "constitution of the national senate" as permitting the States to refuse to elect Senators. The "absolute safeguard" referred to is the "equal suffrage of the States" in the Senate made safe from amendment by Article V.

Thus Hamilton demonstrates:

(1) That under the Federal Plan of the Constitution "determination of suffrage qualifications" was within the sphere of neither Federal or State *Governments*, but rests with the *people* alone through their State Constitutions.

(2) That outside interference with the internal elections of a State (even without dictating the suffrage qualifications of her people) destroyed the State and was not contemplated by the plan,

(3) That to deprive a State of the unhamp-ered right to select, or even refuse to select, her own Senators, would violate the compromise establishing the "equality of the States in the Senate" made perpetual by the plan.

Thus did the most extreme advocate of Nationalism honestly and persuasively expound the constitution while urging the people of New York to ratify. (2)

#### FOURTH.

If in spite of the Tenth Amendment new legislative *powers* may be conferred on Congress, as

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(2) See also the debate on Article V (5 Ell. Deb. 532, printed as an appendix to brief of Plaintiff in error in *Leser vs. Garnett*, No. 553).

This debate shows that the possibility of destroying the ultimate sovereignty, i. e., the *power to consent* which means the *power to vote* was considered by the convention as a *conceivable* *misconstruction* of the amending power and therefore *expressly* *withdrawn*.

appellees claim, they must be *governmental* powers, not sovereignty. Suffrage at least cannot be fossilized. The people's sovereignty is forever reserved to them in their several States.

Even if the Tenth Amendment can be modified *pro tanto*, as appellees claim, by transferring a State *Legislative* Power to the Congress, thus leaving somewhere to the people's representatives legislative power for modification or repeal; nevertheless we maintain that the 10th Amendment cannot be violated in a matter not affecting a *Governmental* Power by setting up a rigid, practically irrepealable, self-executing, rule of sovereignty. Suffrage is sovereignty.

The Nineteenth Amendment attempts to destroy, in part, the people's right to repeal, amend or modify "local suffrage qualifications" except with the permission of stranger legislatures of other States whom they cannot influence or control.

In other words, if the Tenth Amendment does not prevent the addition of new National Legislative Powers it does prevent the fossilization of "local suffrage" leaving no democratic remedy in the people in Congress, or in State Legislatures to change or modify it. It does prevent the destruction of all power over suffrage either by the people themselves or through legislative bodies *in which they are represented*.

If State control is destroyed National control at least must be substituted. Some *democratic* remedy for repeal or modification must remain.

Irrepealable legislation controlling the people's sovereignty has no place in the democratic Government of the United States. If "local" self-government can be destroyed some sort of "self-government" must at least remain.

Appealing to stranger legislators (perhaps 3,000 miles away) whose opinions we can neither influence nor affect, *because they are not responsible to us*, to relieve us from *obnoxious* suffrage rules affecting our right to vote is *most emphatically not a political remedy*. It by no stretch of the imagination can be called *self-government*. It is the slave's petition to irresponsible power. Likewise the imposition upon us of such unchanging suffrage rules is not an *orderly, responsible democratic process of government*.

The Tenth Amendment certainly protects us from that kind of tyranny. The true rule is stated by this Court in *re Duncan*, 139 U. S. 449, 461:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

EVERETT P. WHEELER,  
Of Counsel for Appellant.

See Message of Pres. Monroe, of Apr. 1822  
II "Misc. + Papers of Presidents"  
144, 147-150